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22707—33

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 145

LOUISE A. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 32–53 in No. 129) is reported in 22 B.T.A. 118. The opinion of the Court of Appeals (R. 11) is reported in 65 F. (2d) 809. This opinion rests on the opinion of the same court in a related case (R. 15–27), which is reported in 65 F. (2d) 803.[1]

[1] By a stipulation between the parties (R. 28–29) the decision of the Court in this case is to control the decisions in Nos. 146–150, inclusive, also pending on writs of certiorari to the Court of Appeals of the District of Columbia. The present petitioner is also petitioner in Nos. 147 and 150, and her sister is petitioner in Nos. 146, 148 and 149. Both petitioners are potential remaindermen as well as income beneficiaries under the trust in question. See Appendix B (p. 51) of the Government's brief in No. 129.

JURISDICTION

The judgment of the Court of Appeals was entered May 22, 1933 (R. 11–12). The petition for a writ of certiorari was filed June 9, 1933, and was granted October 9, 1933 (R. 27). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions are the same as those presented in No. 129, except that the petitioner here is a potential remainderman under the trust created by the will of A. C. Whitcomb, as well as a beneficiary of trust income.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A to the Government's brief in No. 129.

STATEMENT

The facts are the same as those set forth at pp. 3–9 of the respondent's brief in *Freuler* v. *Helvering*, No. 129, October Term, 1933, which is to be argued just before this case.

The petitioner here is the daughter of Adolph Whitcomb, and the granddaughter of A. C. Whitcomb. See Appendix B (p. 51) of the respondent's brief in No. 129. The petitioner has received distributions of income under the will of A. C. Whitcomb as one of the representatives of her deceased father. She is also entitled under the will to share in the remainder of the estate upon the termination of the trust at the death of the testator's

daughter, Charlotte Andree, if she is then living (R. 34–35, in No. 129).

The fact that the present petitioner may be a remainderman is the only distinction between this case and No. 129.

ARGUMENT

The petitioner contends that she has a remainder interest in the trust estate and is, therefore, entitled to a deduction for depreciation of the trust property, even if the deduction sought by the beneficiaries who are not remaindermen may not be allowed. The court below rejected this contention and disposed of the present case upon the authority of its decision in the case of one of the beneficiaries who has no remainder interest (R. 11, 15–27). We submit that the decision below is correct and that no deduction may be allowed the petitioner on account of depreciation sustained by the trust property during the taxable years.

The petitioner's remainder interest, whether technically vested or not, is not certain to come into possession. The will of A. C. Whitcomb gave the remainder after the death of his two children to the descendants of the two children (of whom the petitioner is one), "if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, * * *." It is plain, therefore, that it cannot now be told whether the petitioner will ever receive any of the corpus of the trust. Under these circumstances, we submit that there is

no basis for the allowance to her of a deduction on account of the depreciation of the trust property.[2]

Even if the petitioner's interest were vested and certain to come into possession, we submit that it would afford no basis for the allowance to her of a deduction on account of depreciation of the trust property in computing her individual taxable net income during the taxable years. Under the law of California, she had "no estate or interest in the property."[3] *Cf. Archer-Shee* v. *Garland*, [1931] A.C. 212, which involved the nature of the interest of the beneficiary under a similar New York statute. Since she had no estate or interest in the property, it seems obvious that she is not entitled to a deduction on account of a loss sustained by the property.

Moreover, Congress has provided in the Revenue laws that a trust and its beneficiaries shall be separate taxable entities. *Anderson* v. *Wilson*, 289 U.S. 20; *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U.S. 509; *Busch* v. *Commissioner*, 50 F. (2d) 800, 801 (C.C.A. 5th); *Abell* v. *Tait*, 30 F. (2d) 54, 55 (C.C.A. 4th); *Baltzell* v. *Mitchell*, 3 F. (2d) 428 (C.C.A. 1st). The property here in question is a part of the corpus of the trust estate and is for tax

[2] Under the statute, Harvard College is exempt from tax. But if it were taxable, it could scarcely be contended that it would be entitled to a deduction from *its* income on account of depreciation of the trust property. The present petitioner is in no better position in this respect, we submit, than is the ultimate remainderman.

[3] California Civil Code, Sec. 863: "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

purposes the property of the trust, not of the petitioner. Depreciation sustained in respect of that property during the taxable year was a loss falling on the trust and not upon the petitioner, and the deduction which Congress has allowed on account of depreciation may be taken only by the trust as a distinct and independent taxpayer.

Section 219 of the statute requires the petitioner to return her full distributable share of income for taxation and does not authorize any deduction by a beneficiary on account of depreciation of the trust property. The mere fact that the petitioner held a remainder interest in the corpus of the trust estate does not make the loss suffered by the trust through depreciation of trust property a loss sustained by the petitioner in the taxable years, any more than a loss suffered by a corporation is a loss sustained by one of its stockholders for tax purposes. *Nixon* v. *Lucas*, 42 F. (2d) 833 (C.C.A. 2d). The property was not then the property of the petitioner. As remainderman she is entitled only to share in the remnant of the property after termination of the trust. Her right as remainderman is to receive the property such as it may be when the trust is terminated. In the interim the property belongs to the trust and any loss in respect thereof is the loss of the trust, not of the petitioner. *Anderson* v. *Wilson*, *supra*.

The decision below is not in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner* v. *Freuler*, 62 F. (2d) 733, now pending as No. 129, October Term, 1933, or

the decision of the court below in *Whitcomb* v. *Blair*, 25 F. (2d) 528, involving the right of another beneficiary of this same trust to a deduction for depreciation in determining the tax for an earlier year. Both courts, in holding that the beneficiary was not entitled to a deduction for depreciation of the trust property, said that such depreciation was a loss falling upon or borne by the remaindermen. It may not be inferred from such a statement, however, that the lower courts held, or intended to hold, that depreciation of trust property during the term of the trust and before the extent of the remainder interest passing to the remaindermen could be ascertained was a present loss to the remaindermen for which a deduction might be allowed in computing the taxable net income of the remaindermen. Until the trust was terminated it could not be known what property would pass to the remaindermen. They are entitled only to what is left of the property after conclusion of the trust. During the term of the trust the property belonged to it and was subject to the uses and purposes of the trust. The depreciation sustained on the property during the life of the trust is a loss to the trust and not to the beneficiaries or the remaindermen. Such a loss may reduce the interest ultimately passing to the remaindermen, but it is not a present loss sustained by them.

Merle-Smith v. *Commissioner*, 42 F. (2d) 837 (C.C.A. 2d), certiorari denied, 282 U.S. 897, *Falk* v. *Commissioner*, 64 F. (2d) 171 (C.C.A 7th), and *Reynolds* v. *Cooper*, 64 F. (2d) 644 (C.C.A. 10th),

are referred to as in conflict with the decision below. In each of those cases a deduction for depletion of mining property or oil and gas wells held in trust was allowed to beneficiaries entitled to the income derived by the trust from such properties. We submit that the decisions in those cases are unsound. The *Falk* and *Cooper* cases are now before this Court on writs of certiorari, Nos. 225 and 227–229, October Term, 1933, and the brief for the petitioner in the *Falk* case, to which reference is respectfully made, sufficiently sets forth our views on the question. If the decisions in those cases are correct, it must be because of reasons peculiar to depletion, although we contend that there is no distinction between depletion and depreciation so far as that question is concerned.

CONCLUSION

The court below correctly held that the petitioner, a beneficiary of trust income, is taxable upon her full distributive share of the trust income, undiminished by depreciation of trust property, and is not entitled individually to a deduction for depreciation of the trust property. The decision below is correct and should be affirmed.

Respectfully submitted.

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DECEMBER, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933